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No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL PRIVATE TRUCK COUNCIL, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE

Pursuant to Rule 37.2(b) of the Rules of this Court, *amici curiae* National Private Truck Council, Inc. ("NPTC"), American Pyrotechnics Association ("APA"), Chlorine Institute ("CI"), Council on Safe Transportation of Hazardous Articles ("COSTHA"), Dangerous Goods Advisory Council ("DGAC"), Institute of Makers of Explosives ("IME"), International Vessel Operators Hazardous Materials Association ("VOHMA"), International Warehouse Logistics Association ("IWLA"), National Propane Gas Association ("NPGA"), National Tank Truck Carriers, Inc. ("NTTC"), Nuclear Energy Institute ("NEI"), Petroleum Marketers Association of America ("PMAA"), Reusable Industrial Packaging Association ("RIPA"), and Truckload Carriers Association ("TCA") (collectively "*amici curiae*"), move that the Court grant leave to file their brief in support of the Petition for Writ of Certiorari. *Amici curiae* sought the consent of Respondents to file the brief, but that consent was denied. Petitioners have granted consent. In support of this Motion, *amici curiae* state as follows:

Amici curiae are industry associations representing a wide range of business interests who, as part of or incidental to their business, ship or transport goods by motor carrier or vessel in interstate commerce. Virtually all of the member companies of these associations either operate truck fleets or ship goods in interstate commerce via motor carrier. Thus, they are subject to State motor carrier taxes and fees imposed by each of those States, directly when they operate their own truck fleets and indirectly when they ship goods by truck. In addition to the Michigan tax at issue in this case, they are subject to a multitude of State taxes and fees applicable to interstate commerce by truck because they individually transport goods by truck in a number of States, and collectively in all 50 States and the District of Columbia.

To the extent that those taxes and fees, like the Michigan tax here, are not properly apportioned by activity in the taxing State, these companies must pay a disproportionate tax solely because of the interstate nature of their operations.

Amici curiae have a legitimate interest in participating in this litigation because they face a concrete and recognizable harm if the Michigan Court of Appeals decision is permitted to stand. Not only does the Michigan tax itself directly harm a number of *amici curiae's* member companies, the decision below offers a road map for other states to adopt similar taxes that impede the free flow of interstate commerce. Thus, *amici curiae* will be subject to additional state taxes and fees simply because they engage in interstate commerce if the decision is allowed to stand.

This Court's rules permit "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties . . ." Rule 37.1. In this case, *amici curiae's* brief is necessary to bring to the Court's attention the vast practical consequences of the Michigan Court of Appeals decision. The decision below is clearly contrary to this Court's established precedent in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and other cases which invalidated unapportioned flat taxes like the Michigan tax. Unless overturned, the decision below will call into question those precedents, and permit other states to impose levies like Michigan's. In addition to paying the Michigan tax, industries represented by *amici curiae's* member companies will be faced with a host of costly tax measures aimed at maximizing State revenues at the expense of interstate commerce. It is essential for this Court to be aware of the broad implications of the decision below, and *amici curiae's* brief seeks to do that.

For these reasons, *amici curiae* request that the Court grant this Motion for Leave to File.

Respectfully submitted,

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QUESTION PRESENTED

Whether Michigan's unapportioned flat tax of $100 per vehicle per year for the privilege of transporting property between points within the State can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae here consist of several industry associations representing a wide range of business interests who, as part of or incidental to their business, ship or transport goods by motor carrier or vessel in interstate commerce.[1]

The National Private Truck Council, Inc. ("NPTC") is a Virginia corporation operating as a trade association representing the interests of over 500 companies that operate truck fleets in furtherance of non-transportation primary businesses. The members operate trucks in interstate and intrastate commerce in all 50 states, and they range in size from Fortune 500 companies to smaller local distribution entities. They transport both raw materials and finished goods in a wide variety of businesses including food and beverages, heavy manufacturing, electronics, retail distribution, chemicals and petroleum products, and apparel.

The American Pyrotechnics Association ("APA") is the leading trade association representing the domestic fireworks industry. It has three principle aims: (1) to encourage safety in the design and use of all types of fireworks; (2) to provide industry information and support to its members; and (3) to promote responsible regulation of the fireworks industry. Individual APA members are typically involved in one or more aspects of the fireworks industry: sale and distribution,

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1. As noted in the Motion for Leave to File, counsel for Respondents has not consented to the filing of this brief. Petitioners have consented.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or its members, made a monetary contribution to the preparation or submission of this brief.

manufacturing, and public display. As part of their operations, many APA members hold a motor carrier registration, maintain a fleet of commercial motor vehicles, and transport shipments of pyrotechnics in both interstate and intrastate commerce.

The Chlorine Institute, Inc. ("CI") is a 200 plus-member worldwide association of producers, packagers, distributors, users and suppliers of chlorine, sodium and potassium hydroxides, hydrogen chloride in all forms, and sodium hypochlorite. CI's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of those chemicals.

The Council on Safe Transportation of Hazardous Articles ("COSTHA") is a not-for-profit organization representing manufacturers, shippers, distributors, carriers, freight forwarders, and container manufacturers involved in the transportation of hazardous materials in interstate, intrastate and foreign commerce. Some of COSTHA's over 100 member companies operate their own truck fleets, while others ship goods via trucks throughout the United States.

The Dangerous Goods Advisory Council ("DGAC") is a non-profit association established in 1974 to promote the safe transportation of dangerous good (known domestically as hazardous materials) by supporting adoption of sound, effective, and uniform safety standards, and by providing extensive training programs. It is comprised of 140 large and medium-sized companies engaged in shipping and transporting dangerous goods, associated businesses, and 19 trade associations representing thousands of air, highway, and rail transporters, chemical producers and distributors, and packaging manufacturers. As a part of or incidental to their business, many of DGAC's members transport or cause to be transported

hazardous materials into or through more than 30,000 jurisdictions in the United States.

The Institute of Makers of Explosives ("IME") is the safety and security association of the commercial explosives industry. The IME represents manufacturers of high explosives and other companies that distribute explosives or provide other related services. Over 2.5 million metric tons of explosives are consumed annually in the United States, of which IME member companies produce over 95 percent. These products are transported in every state in the Union and are distributed worldwide. As a part of or incidental to their business, all of IME's members transport hazardous materials.

The International Vessel Operators Hazardous Materials Association ("VOHMA") is a United States based international association, with a membership comprised of thirty-eight ocean common carriers, operating under the flags of several nations, with the purpose of serving the domestic and international trades in matters pertaining to vessel and intermodal transport of hazardous cargoes. The primary goal of VOHMA is to advocate and promote safe, consistent, and cost-beneficial transport of such cargoes based upon discussion and evaluation of issues impacting maritime operations and interconnecting feeder systems, and to develop consensus positions on all issues which may have a significant impact on transportation safety. Much of the freight that is transported by VOHMA members on the ocean is also transported by truck before or after the water segment.

The International Warehouse Logistics Association ("IWLA") represents 3PLs (third-party logistics providers), public and contract warehouse companies and their suppliers. Since 1891, the IWLA has worked to promote and advance the

logistics outsourcing industry. The 550 IWLA members worldwide ship more than three trillion pounds of goods annually and operate more than 400 million square feet of public and contract warehouse space, providing the most timely and cost-effective global logistics solutions for their customers. As such they are committed to protecting the free flow of goods and services across borders.

The National Propane Gas Association ("NPGA") is the national trade association of the LP-gas (principally propane) industry with a membership of over 3,600 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

National Tank Truck Carriers, Inc. ("NTTC") is a trade association composed of approximately 185 trucking companies which specialize in the nationwide transportation of hazardous materials, hazardous substances and hazardous wastes in cargo tank motor vehicles. NTTC estimates that its members operate approximately 50,000 such vehicles and utilize 45,000 drivers.

The Nuclear Energy Institute ("NEI") is an industry policy organization that fosters the beneficial uses of nuclear technologies worldwide. The NEI's members include leading universities, research laboratories, radiopharmaceutical and radioisotope manufacturers, as well as companies that operate

commercial nuclear power plants, their suppliers, labor unions and others. The NEI's members transport radioactive materials to and from their facilities across the United States on a daily basis. These companies are committed to the safe, efficient transportation of these materials, and oppose state legislative or regulatory actions like the Michigan flat tax that impose an unreasonable burden on interstate commerce.

The Petroleum Marketers Association of America ("PMAA") is a federation of 42 state and regional trade associations representing 8,000 small, independent petroleum marketers. These marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in this country annually. PMAA has members in Michigan who must pay the annual fee imposed by the State.

The Reusable Industrial Packaging Association ("RIPA") is the trade association representing North American container reconditioners, manufacturers, and distributors of reusable industrial packaging. Membership in RIPA encompasses over 90% of the industrial packaging reconditioning industry in the United States, many of the leading manufacturers of drums and intermediate bulk containers, as well as many reconditioning and manufacturing companies worldwide. RIPA members design, manufacture, recondition and remanufacture a wide range of reusable industrial packagings for reuse and recycling.

Truckload Carriers Association ("TCA") is the national trade association representing the truckload segment of the trucking industry. Truckload carriers account for approximately 97 percent of the for-hire freight tonnage annually transported

by motor carriers in this country, and a portion of TCA's membership transport hazardous materials.

Virtually all of the member companies of these industry associations either operate truck fleets or ship goods in interstate commerce via motor carrier. The companies are therefore subject to State motor carrier taxes and fees imposed by each of those States, directly when they operate their own truck fleets and indirectly when they ship goods by truck. Because they individually transport goods by truck in a number of States, and collectively in all 50 States and the District of Columbia, they are subject to not only the Michigan tax in question but to a multitude of State taxes and fees applicable to interstate commerce by truck. To the extent that those taxes and fees are not properly apportioned by activity in the taxing State these companies must pay a disproportionate tax solely because of the interstate nature of their operations.

For example, the $100 per vehicle Michigan tax applies regardless of the number of miles operated in the State. If each State and the District of Columbia imposed a similar tax, the *amici* could end up paying $5,100 per vehicle in annual fees while a vehicle that operated solely within Michigan would pay only $100 per year in fees, regardless of the number of miles operated annually by each vehicle.

Moreover, the *amici* have member companies that ship or transport hazardous waste or hazardous materials in some form. As noted by the Petitioners, States have imposed a significant number of additional taxes and fees on transportation of hazardous waste or hazardous materials, *see Petition at 24-25, n.12 and n.13,* and often justify the non-apportioned and discriminatory nature of those fees under their State regulatory power. Nothing in this Court's Commerce Clause opinions,

however, justifies ignoring the requirements for apportionment and non-discrimination by classifying a tax on interstate commerce as a regulatory fee.

Thus, the decision below has consequences far beyond the validity of the Michigan tax. If this Court allows the Michigan Court of Appeals decision to stand, it will provide a road map to other States on how to avoid Commerce Clause limitations on State taxes. Companies that do business in the several States will be without recourse when additional States seek to generate revenue by taxing out-of-state entities.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENT

The Michigan tax on motor carriers carrying goods to, from or between points in that State, MCL § 478.2(1), is an unapportioned flat tax on companies that carry goods in interstate commerce. As such, it is a violation of this Court's precedents prohibiting such levies, most notably *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987). Such taxes have an adverse economic impact on *amici curiae's* member companies by erecting a financial barrier around Michigan. The tax is therefore unconstitutional because it violates the Commerce Clause of the United States Constitution. This Court's intervention is necessary to overturn a state court decision antithetical to this Court's precedents.

The lower court's error is no more glaring than in its rigid insistence on classifying the Michigan tax as a "regulatory fee" designed to pay for the administration of the Michigan Motor Carrier Act. This Court's established decisions in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and *Scheiner* require that courts look to the practical effect of state taxes on interstate

commerce. When any type of state fee imposes on out-of-state companies a cost disproportionate to the amount of miles those companies travel in the state, the Commerce Clause is violated. The lower court's tax versus fee distinction is inapplicable in Commerce Clause analysis, and led to an erroneous ruling.

Amici curiae's participation in this case is a testament to the broad implications of the Michigan court's opinion. Many of *amici curiae's* member companies will be hurt by the Michigan tax. Beyond that, however, permitting the lower court's decision to stand will encourage other states to adopt similar measures. *Amici curiae* and other industries would be open to a potential flood of fees and taxes aimed at interstate goods. This Court should grant review of the lower court's decision to prevent other states from following Michigan's example.

The Michigan tax is even more discriminatory than the taxes at issue in the *Scheiner* case. In *Scheiner*, the tax burden fell on a larger category of interstate motor carriers, thus spreading out the harmful effects over a wider range of taxpayers. In this case, the harmful effects fall on a smaller group of carriers, i.e., those interstate carriers who have a limited amount of intrastate trips. Under these circumstances, if the Pennsylvania taxes in *Scheiner* could not pass constitutional muster, surely the Michigan tax must fall.

Unlike the federal government, many states are required to adopt balanced budgets. In the last several years, states have faced a serious budget crunch that has made that task even more difficult. To address these budget problems, states naturally look to impose taxes on out-of-state business interests which have a limited voice in creating state policy. The Michigan tax is a way for the state to tap into an out-of-state revenue source while

protecting instate business. Allowing the decision below to stand will encourage other states to make similar end runs around the Commerce Clause and cause greater economic hardship to *amici curiae* and other interstate business.

Finally, this Court's intervention is needed to provide a greater degree of certainty to Commerce Clause jurisprudence. The Michigan Court of Appeals decision is another in a long line of state policies and court decisions that challenge the Commerce Clause. As noted, states continue to find new ways to tax interstate commerce as a way to increase revenues and protect instate interests. A ruling by this Court repudiating the lower court's decision will provide more certainty in Commerce Clause jurisprudence and discourage state courts and lawmakers from eroding the federal Constitution's guarantee of a free flow of commerce among the states.

ARGUMENT

1. MICHIGAN'S UNAPPORTIONED FLAT TAX CLEARLY VIOLATES *AMERICAN TRUCKING ASSNS., INC. v. SCHEINER*

The Michigan Court of Appeals decision[2] to uphold the Michigan flat tax, MCL § 478.2(1), is yet another in a long line of state actions that, if allowed, would unfairly restrict the ability of thousands of business interests to conduct business freely across state lines. The decision below is clearly contrary to this Court's precedents rejecting such state action as violative of the Federal Constitution's Commerce Clause, most notably in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266

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2. *Westlake Transportation, Inc. et al. v. Michigan Public Service Comm'n, et al.*, 662 N.W.2d 784 (Mich. Ct. App. 2003) (App. 1a-32a).

(1987).[3] Nothing in *Scheiner* suggests that the approach taken by the Michigan Court of Appeals is constitutionally valid.

In a decision that crystallized a "'quagmire' of judicial responses to specific state tax measures," *id.* at 280 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1950)), *Scheiner* affirmed precedents invalidating taxes that favor in-state business at the expense of out-of-state business, *Scheiner*, 483 U.S. at 286 (citing with approval *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977)) and rejected decisions upholding such levies, *Scheiner*, 483 U.S. at 292-97.

The Court in *Scheiner* followed its earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which established a four-part test to determine whether state taxes violate the Commerce Clause.[4] Of particular importance in this case is *Complete Auto Transit's* requirement that a state tax be

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3. *See also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 93 (1995).

4. A state tax is unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 93, 183 (1995) (quoting *Complete Auto Transit*, 430 U.S. at 279).

"fairly apportioned." *Id.* at 279. To be considered fairly apportioned, a tax must meet the "internal consistency" test, to wit, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco Inc. v. Hardesty*, 467 U.S. at 644. While *amici* here will forgo a repetition of the cogent and comprehensive analysis of *Complete Auto Transit* and *Scheiner* found in the Petition, *Scheiner's* bottom line is worth repeating: "imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Id.* at 296.

The only instance in which *Scheiner* anticipated that an unapportioned flat tax may be permissible is that in which collection of the tax is administratively impracticable. *Id.* at 296-97 (Earlier precedents upholding flat taxes are still valid in that "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens."). But the Court even then recognized that "[t]he administrative machinery of revenue collection *for highways* is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage . . ." *Id.* at 297 (emphasis added). There is no question that Michigan may administer an apportioned motor carrier tax without undue burden. States routinely apportion motor carrier taxes by mileage or by fuel consumption within a State. Thus the Michigan tax on interstate motor carriers falls outside the narrow category of administratively impracticable flat taxes. If anything, the technological advances since *Scheiner* was decided, permitting a greater volume of information sharing at a faster rate, make it

even easier for Michigan to administer an apportioned tax on interstate motor carriers.

The member companies and organizations represented by *amici* here number in the thousands and do business in every state of the Union. They face a steady barrage of actions by state and local taxing authorities across the country seeking to maximize revenues for their individual jurisdictions. The Court's "internal consistency" test is not merely an academic exercise for these companies. It is an essential safeguard against a potential phalanx of individual state levies that would threaten to increase transportation costs virtually without limit. The decision below has serious implications not just in Michigan, but in every other jurisdiction with the power to tax interstate carriers. The Court's intervention is necessary to preserve the principles plainly enunciated in *Scheiner* and repudiate a state court's decision to uphold a state action that impedes the free flow of interstate commerce.

2. THE LOWER COURT'S CATEGORIZATION OF THE MICHIGAN TAX AS A "REGULATORY FEE" IS CONTRARY TO THIS COURT'S MANDATE THAT STATE TAXES BE JUDGED ON THEIR EFFECT ON INTERSTATE COMMERCE

The Michigan Court of Appeals erroneously reasoned that *Complete Auto Transit* and *Scheiner* do not apply in this case because the principles enunciated in those cases apply to "the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state . . . not regulatory statutes." *Westlake Transportation, Inc. et al. v. Michigan Public Service Comm'n, et al.*, 662 N.W.2d 784, 803 n.15 (Mich. Ct. App. 2003) (App. 29a). This error stemmed from an earlier part of the decision involving the

question of whether the Michigan tax was a registration fee or a regulatory fee for the purposes of deciding whether the fee was preempted by federal law. *Id.* at 790-96 (App. 6a-18a). After an exhaustive look at the historical and current state and federal law governing registration of motor vehicles and the Michigan tax at issue, the court determined that the $100 levy is a "regulatory fee" designed "for the administration of the [Michigan Motor Carrier Act], particularly covering the costs of enforcing safety regulations." *Id.* at 795 (App. 15a). Having made this conclusion in the context of its preemption analysis, the court never wavers in categorizing the tax as a "regulatory fee."

The lower court's rigid insistence on classifying the tax as a "regulatory fee" is contrary to this Court's mandate that, for Commerce Clause purposes, the proper focus should be on the effect the levy has on interstate commerce, and not on the classification assigned by lawmakers. *Scheiner*, 483 U.S. at 294-95 ("In 1977, while we recognized that we had invalidated privilege taxes on instate activity deemed to be part of interstate commerce, we also noted that we had 'moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology. . . . These decisions have considered not the formal language of the tax statute but rather its practical effect. . . .'" (quoting *Complete Auto Transit*, 430 U.S. at 281, 279)).

If the decision below is allowed to stand, any state could avoid Commerce Clause requirements by allocating tax revenues by category to specific spending accounts and ceremoniously dub them "regulatory fees." The effect of such an outcome would be to make the dormant Commerce Clause the Maginot Line of constitutional protection of interstate commerce, easily

circumvented by state taxing authorities. This Court should grant the petition to affirm its precedent in *Scheiner* and *Complete Auto Transit*.

3. THE MICHIGAN TAX HAS AN EVEN GREATER DISCRIMINATORY EFFECT THAN THE TAXES INVOLVED IN *SCHEINER* BECAUSE IT APPLIES SOLELY TO INTRASTATE COMMERCE

The Michigan tax requires any motor carrier carrying goods to, from, or between points in Michigan to pay the $100 levy, whether they engage solely in intrastate trips or do a combination of intrastate and interstate hauls. MCL § 478.2(1). The tax, therefore, applies solely to transportation that has some intrastate component. Interstate trips that merely pass through Michigan and neither drop off nor pick up goods there are immune from the levy. Thus, 100 percent of the revenue generated is derived from trips with some portion of the haul originating or ending in Michigan.

The burden of generating that revenue, therefore, falls on a more limited number of carriers than would be the case if Michigan had taxed all motor carrier transportation, including trips that merely pass through the state. In this light, the example provided by Petitioners — a truck "topping off" its interstate haul with cargo transported between two points within Michigan — is even more troublesome. Those interstate carriers must pay the full $100 fee but travel far less miles annually in Michigan than solely intrastate carriers who pay the same fee. At the same time, interstate hauls that merely pass through the state pay nothing, yet receive some benefit from the regulatory regime purportedly financed by the fee.

The Michigan fee is far more pernicious than the Pennsylvania fees that this court invalidated in *Scheiner*. In this case, an even greater burden is placed on interstate carriers with limited intrastate hauls because the benefit received in relation to the tax paid is far less than the other categories of motor carriers. The disparity of benefit received as a proportion of the fees paid is stark. Imposing a greater cost per mile on interstate trucks is exactly the kind of discrimination prohibited by this Court. *Scheiner*, 483 U.S. at 286 ("In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory."). In this case, the cost per mile to interstate carriers which make limited intrastate hauls is even greater than that in *Scheiner*. Thus, the Michigan tax has an even greater discriminatory effect that the unconstitutional levies imposed by Pennsylvania.

4. STATES CONTINUE TO LOOK FOR OUT OF STATE SOURCES OF REVENUE IN DIFFICULT ECONOMIC TIMES

Despite the Court's unequivocal opinions in *Complete Auto Transit* and *Scheiner*, states continue to impose revenue raising measures that adversely impact interstate commerce. The Petition notes six separate cases in which courts have invalidated flat state taxes or fees. Petition at 11 n.6. *Amici* are aware of over two dozen actions filed by the American Trucking Associations in 15 states challenging flat state taxes and fees imposed on interstate trucking.

The reason for these continued attempts to circumvent the dormant Commerce Clause is clear: states must find new sources of revenue to offset budgetary pressures, especially in hard economic times. The nation's economic climate in the past

several years illustrates the point. The latest *Fiscal Survey of States* issued by the National Governors Association and the National Association of State Budget Officers reported that "states continue to grapple with short-term cyclical and long-term structural problems. Plagued by budget shortfalls for the past three years, states still face uncertainty in the current fiscal year and difficult budgetary choices in the years ahead." *Fiscal Survey of States*, Executive Summary, p. ix (Dec. 2003). Faced with the "familiar" struggle of having to balance their budgets, states have reported the lowest increases of expenditures since 1979, while revenue collections remain stagnant. *Id.*

The most politically expedient way for states to remedy these shortfalls is to impose taxes on entities whose clout with state and local government is limited, i.e., out-of-state business. Taxes such as the Michigan levy are doubly attractive to state lawmakers. Revenue generated disproportionately from interstate commerce only hurts out-of-state interests, while providing an economic benefit to instate businesses. *Scheiner* recognized this. *Scheiner*, 483 U.S. at 284 (the "inevitable effect [of unapportioned flat taxes] is to threaten the free movement of commerce by placing a financial barrier around the State . . .). Local economies thus are benefited at the expense of companies doing interstate business. This situation is plainly contrary to "the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange*, 429 U.S. at 328). Permitting the decision below to stand will only exacerbate many states' willingness in the face of budgetary emergencies to impose taxes that benefit local economies at the expense of interstate business.

5. THE DECISION BELOW FOSTERS UNCERTAINTY IN COMMERCE CLAUSE JURISPRUDENCE

Seventeen years ago, this Court seemingly solidified a "'quagmire' of judicial responses to specific state tax measures . . ." *Scheiner*, 483 U.S. at 280. Despite the Court's clear language and indisputable reasoning, dormant Commerce Clause jurisprudence continues to be uneven. State taxing authorities continue to search for ways to burden interstate carriers with taxes that benefit their intrastate competitors. Many industries, only some of which are represented by *amici*, are continually confronted with taxes like the one at issue here, and face extensive and costly litigation to defeat state efforts to disproportionately tax interstate commerce.

The Court should grant the Petition to provide a greater degree of certainty in Commerce Clause jurisprudence. To allow the decision below to stand would permit states to declare any tax a "regulatory fee" as an easy way to escape from constitutional scrutiny. The Court must repudiate the Michigan Court of Appeals' erroneous decision and put the Commerce Clause on firm footing for the benefit of the free flow of commerce among the states guaranteed by the United States Constitution.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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